U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: DEC 1 2 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case. This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The employment-based preference visa petition was denied by the director of the Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn. The petition will be remanded to the director.

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is October 25, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The petitioner describes itself as an IT consultancy. It seeks to permanently employ the beneficiary in the United States as a software developer. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

As set forth in the director's denial, the single issue in this case is whether or not the marriage bar under section 204(c) of the Act prohibits the approval of the instant petition.

The petitioner's ETA Form 9089 was filed with DOL on October 25, 2012 and certified on February 5, 2013. The petitioner subsequently filed Form I-140 with U.S. Citizenship and Immigration Services (USCIS) on April 29, 2013. The director denied the petition on June 21, 2013.

The record reflects that a Form I-130 was filed on the beneficiary's behalf on October 4, 2009. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a United States citizen (USC). The record contains the completed forms, signed by the beneficiary, and a copy of a marriage certificate between the beneficiary and [redacted] (USC) dated August 17, 2009.

The record reflects that the petitioner withdrew the Form I-130 petition in a letter dated November 19, 2009 and received by the director on December 17, 2009. The Form I-130 petitioner sent a second letter received by the director on December 31, 2009 in which she stated that the beneficiary never moved in with her and that he stayed in Atlanta as he was offered a job there and his ex-girlfriend lived there.

[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States. *See also* 8 C.F.R. § 204.5(k)(1).

Section 204 of the Act governs the procedures for granting immigrant status. Section 204(c) provides the following:

> Notwithstanding the provisions of subsection (b)[2] no petition shall be approved if:
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> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

On May 13, 2013, the director sent a Notice of Intent to Deny (NOID) to the petitioner finding it more likely than not that the beneficiary conspired to enter into a marriage for the purpose of evading the immigration laws.

In response to the NOID, the petitioner provided numerous affidavits from friends and family to establish that the beneficiary entered into a *bona fide* marriage and that the USC had a drug problem causing the beneficiary to file for an annulment of the marriage in September 2010. The record contains a judgment annulling the beneficiary's marriage to the USC on June 27, 2011.

On June 12, 2013, the director denied the I-140 visa petition. The director discussed inconsistencies in the lease agreements filed in connection with the Form I-130 petition; noted that the petitioner had not disclosed on the Form I-140 two previous Form I-130 petitions filed on behalf of the beneficiary; and cited Section 204(c) prohibiting an alien who has entered into a fraudulent marriage to obtain an immigrant visa. The director stated that the petitioner did not meet its burden of proof. While the basis for the director's decision is vague, the director suggests that because the beneficiary was involved in marriage fraud, under Section 204(c) of the Act the beneficiary is ineligible for the benefit sought and the petition must be denied.

On appeal, counsel asserts that the inconsistencies cited by the director in his denial are not material and have been explained and resolved by the evidence in the record and the additional documents provided in the instant appeal.

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading the immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

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[2] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

There is not substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. The record of proceeding does not contain sufficient evidence that a family-based immigrant petition was filed solely to obtain an immigration benefit for the beneficiary.

Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is withdrawn.

The petition may not be approved, however, as the director has not adjudicated the merits of the petition.

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
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> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Thus, the petition will be remanded for the director to determine whether the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a

professional holding an advanced degree. The director should also determine whetherthe petitioner has established that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a master's degree in electrical engineering, computer science, or related equivalent and 36 months of experience in the job offered. Further, the offered position provides for an alternate combination of education and experience, a bachelor's degree and five years of progressive experience and 36 months of experience in an alternate occupation.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience as a Programmer Analyst with in from August 12, 2008 until January 30, 2011; and a Programmer Analyst with in from July 1, 2007 to February 28, 2008. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(g)(1). The record contains an experience letter from President on letterhead stating that the company employed the beneficiary as a programmer analyst from August 12, 2008 until January 14, 2011; and an experience letter from , HR Manager on letterhead stating that the company employed the beneficiary as a programmer analyst from July 1, 2007 until February 28, 2008.[3] Further, has informed USCIS that the beneficiary has been employed as a programmer analyst contractor since 2009. Further, representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner cannot be used to qualify the beneficiary for the certified position.[4] In response to question J.21, which asks, "Did the alien gain any of the qualifying

[3] USCIS records show that the beneficiary resided from October 2009 to October 2012 in and , not in or where the claimed work was performed.

[4] 20 C.F.R. § 656.17 states:

(h) Job duties and requirements. (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

. . . . .

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

experience with the employer in a position substantially comparable to the job opportunity requested?" the petitioner answered "no." The petitioner specifically indicates in response to question H.6 that 36 months of experience in the job offered is required and H.10 that experience in an alternate occupation is acceptable. In general, if the answer to question J.21 is no, then the

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(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) Actual minimum requirements. DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

(3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer's actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

(i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
(ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

(4) In evaluating whether the alien beneficiary satisfies the employer's actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer's expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term ''employer'' means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.
(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable[5] and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was as a programmer analyst, and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position.

Next, the regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

According to USCIS records, the petitioner has filed over 14 Forms I-140 petitions on behalf of other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977). The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries

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[5] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

> 5) For purposes of this paragraph (i):
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> . . .
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> (ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

have obtained lawful permanent residence. Thus the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary and the proffered wages to the beneficiaries of its other petitions.[6]

In view of the foregoing, the director's decision is withdrawn and the petition is remanded. The current record does not establish marriage fraud pursuant to § 204(c) of the Act. The director may issue a request for evidence specifically requesting proof of the bona fides of the marriage at its inception. Similarly, the director may request evidence to establish whether the petition is approvable for an advanced degree professional and whether the petitioner has the ability to pay the beneficiary and the remaining sponsored beneficiaries. Upon receipt of any response, the director will review the entire record and enter a new decision.

As always, the burden of proof remains with the petitioner. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision, which, if adverse to the petitioner shall be certified to the AAO for review.